

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002**

**(202) 565-5330
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Date: May 13, 1999
Case No. 1999-INA-84

In the Matter of:

CAVEY LANDSCAPES,
Employer,

on behalf of

RONY MORATAYA MORALES,
Alien.

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Appearance: Luis F. Salgado, Esquire
For Employer and Alien

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification¹ for the position of Landscape Gardener. The CO denied certification on the ground that the position of Landscape Gardener does not constitute permanent full-time employment. (AF 5-6).

STATEMENT OF THE CASE

On April 17, 1997, Cavey Landscapes ("Employer"), filed an application for labor certification to enable Rony Motataya Morales ("Alien") to fill the position of landscape

¹Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

gardener/supervisor. (AF 15). The job duties for the position are:

Plans and executes landscaping tasks and maintains grounds and landscape of private and business residences. Supervises and coordinates activities of workers engaged in landscaping and turf maintenance and participates in preparing and grading terrain, applying fertilizers, seeding and sodding lawns and transplanting shrubs and plants, using manual and power operated equipment. Plans lawns, and plants and cultivates them using gardening implements and power-operated equipment. Plants new and repairs established lawns, using seed mixtures and fertilizers. Locates and plants shrubs, trees and flowers selected by property owner. Mows and trims lawns, using hand mower or power mower. Trims shrubs and cultivates gardens. Cleans grounds using rakes, brooms and hose. Sprays trees and shrubs and applies supplemental liquid and dry nutrients to lawn and trees.

Id. On July 2, 1998, the CO issued a Notice of Findings (“NOF”), proposing to deny certification on several grounds. (AF 12-13). The CO questioned whether permanent full-time employment² was available to the Alien because landscaper jobs are usually seasonal. The CO indicated that Employer could rebut this finding by submitting payroll records for the last three years for all workers employed in this or similar positions, and indicated that the weekly payroll records must show each employee by name, the number of hours worked, and gross wages. (AF 13). The CO also required Employer to document: (1) that the job duties are performed on a continuing basis; (2) that the job is career oriented and one for which the applicant has demonstrated a commitment; and (3) that occupants of the position have remained year after year and are not financially dependent on obtaining other employment or unemployment compensation during intermittent breaks in the year. *Id.*

Employer’s rebuttal, dated September 8, 1998, contended that the position offered is for a permanent full-time, 12-month position. Employer further stated that the position sought is a management supervisor and the duties can be differentiated from those of a landscape gardener. (AF 9). Employer did not submit payroll records in response to the NOF; instead, Employer submitted a letter explaining that the position is a “new and future” position in the company and does not exist at the present time. (AF 7).

The CO issued a Final Determination (“FD”) denying certification on September 17, 1998. (AF 5). The CO indicated that Employer’s documentation provided insufficient information to determine whether the Alien would perform the duties of a landscape gardener/supervisor on a permanent full-time basis year round. *Id.* The CO explained that Employer’s statement differentiating between a landscape gardener and supervisor had no bearing on whether the position was permanent and full-time. *Id.* From these findings, the CO concluded that the application remained in violation of Federal regulations and accordingly

²Federal regulations at 20 C.F.R. 656.3 (Subpart A) define “employment” as permanent full-time work by an employee for an employer other than onself.

denied labor certification. *Id.* Employer requested review (AF 1) and the file was transmitted to the Board of Alien Labor Certification Appeals (“Board”).

DISCUSSION

In an *en banc* decision, a majority of the Board in *Vito Volpe Landscaping* defined the nature and content of full-time employment for landscape workers. *See Vito Volpe Landscaping*, 91-INA-300 (June 3, 1993) (*en banc*). The requirement of 20 C.F.R. 656.3, that the position be permanent and full-time, therefore is settled. In the instant case, the issue is whether the job offered fits the definition of “seasonal employment” as defined in *Vito Volpe*. Thus, it is necessary to determine whether Employer sufficiently established that the Alien will be employed full-time throughout the year.

In its Request for Review, Employer argues that the CO erroneously classified the position offered as a “Landscape Gardener” instead of a “Landscape Design and Turf Management Supervisor,” and as a result of this erroneous finding, misapplied the law. However, Employer will not prevail simply by asserting that two positions differ in terms of the relative supervisory duties.³ Here, the law was not misapplied. The CO denied certification because the duties of the latter position had no relationship to the job duties originally described in Part A of Form ETA 750, and because Employer failed to sufficiently demonstrate how the positions are dissimilar.

Further, the evidence submitted by Employer is unpersuasive. Employer’s rebuttal consisted solely of a letter indicating the need for a Landscape Design and Turf Management Supervisor, without demonstrating the permanent full-time nature of the position. The burden of proof, in the twofold sense of production and persuasion, is on the employer, where it belongs. *See Cathay Carpet Mills, Inc.*, 87-INA-161 (Dec. 7, 1988) (*en banc*). In the present case, the issue is not whether the position is a supervisory one, but whether it is permanent and full-time. We find it is not. In the rebuttal, Employer had an opportunity to demonstrate the permanent full-time nature of the position. Instead, Employer attempted to redefine the initially labor intensive position to one that incorporated a number of job duties originally omitted from Part A of Form 750. Specifically, we find Employer has failed to rebut that the position offered is “seasonal employment” as defined in *Vito Volpe*. Thus, the CO’s denial of this application was proper.

The job opportunity in this case does not provide permanent, full-time work. Accordingly, the following order shall enter.

³*See Lee Gelfond Chocolate, Inc.*, 90-INA-350 (Sept. 17, 1991), the only difference between the duties of candymaker and chocolate figurine quality control leadperson was an unspecified amount of training and supervisory duties, and the employer failed to specify what percentage of time was spent on supervisory duties. Accordingly, the panel found that the employer had not shown the positions to be sufficiently dissimilar.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the Panel:

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.